MESSRS KUMAR JASPAL QUAH & AISHAH

v.

DATO' PEH TECK QUEE

HIGH COURT MALAYA, KUALA LUMPUR
HISHAMUDIN MOHD YUNUS J
[CIVIL SUIT NO: D6-22-1405-2000]
17 FEBRUARY 2003

CIVIL PROCEDURE: *Trial - Witness - Cross-examination, application for - Rules of the High Court 1980, O. 38 r. 2(3) - Whether cross-examination can be ordered by court if witness did not give affidavit evidence - Whether application to cross-examine misconceived*

EVIDENCE: *Cross-examination - Witness - Cross-examination, application for - Rules of the High Court 1980, O. 38 r. 2(3) - Whether cross-examination can be ordered by court if witness did not give affidavit evidence - Whether application to cross-examine misconceived*

The plaintiff (a law-firm) filed a claim against the defendant for outstanding legal fees in respect of professional services allegedly rendered to the defendant. In opposing the plaintiff's application to enter summary judgment, the defendant averred, *inter alia*, in his affidavit ('encl. 5') that he only discovered the plaintiff's notes of professional charges for the first time upon reading the plaintiff's affidavit ('encl. 4') in support of the O. 14 application. In reply to that, the plaintiff averred ('encl. 6') that its notes of professional charges had earlier been delivered by hand to the defendant's secretary ('secretary Teh'). The defendant replied ('encl. 6A') maintaining his assertions in encl. 5. The instant appeal was from the decision of the senior assistant registrar ('the SAR') dismissing the plaintiff's application under O. 38 r. 2(3) Rules of the High Court 1980 ('RHC') to cross-examine secretary Teh in respect thereof.

Held:

[1] The plaintiff's application to cross-examine secretary Teh was misconceived. Order 38 r. 2(3) of the RHC only empowers the court to order the attendance of the person making the affidavit for the purpose of cross-examination. In the present case, Secretary Teh did not affirm any affidavits; hence, the question of cross-examining her

under O. 38 r. 2(3) RHC could not have arisen. Not having sworn an affidavit, there was no material on which the plaintiff could cross-examine secretary Teh. (pp 125 c-e, 127 e-h & 128 a-c)

[Plaintiff's appeal dismissed.]

Case(s) referred to:
Gomez v. Gomez [1969] 1 MLJ 228 ***(dist)***
Leiserach v. Schalit [1934] 2 KB 353 ***(dist)***
William Horace Sault v. Noriah Osman [1950] 16 MLJ 207 ***(dist)***

Legislation referred to:
Rules of the High Court 1980, O. 14, O. 38 r. 2(3)
Rules of the Supreme Court 1957, O. 38 r. 1

For the plaintiff - V Ravindran; M/s Kumar Jaspal Quah & Aishah
For the defendant - K Ramesh; M/s Chellam Wong

Reported by Gan Peng Chiang

JUDGMENT

Hishamudin Mohd Yunus J:
This is an appeal against the decision of the learned senior assistant registrar of the High Court of Kuala Lumpur (Commercial Division).

In her decision of 9 February 2001, the learned senior assistant registrar (hereinafter shall be referred to as "the registrar") dismissed the plaintiff's application to "cross-examine" the defendant's secretary, one Miss Teh Li Li (hereinafter shall be referred to as "Miss Teh"), for the purpose of the hearing of the plaintiff's application for summary judgment against the defendant pursuant to O. 14 of the Rules of the High Court 1980 (hereinafter shall be referred to as "the RHC").

The application to cross-examine Miss Teh was made pursuant to O. 38 r. 2(3) of the RHC.

Order 38 r. 2(3) reads:

> (3) In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any

such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

In the present case, the plaintiff claims against the defendant for unpaid legal fees in respect of professional services allegedly rendered by the plaintiff to the defendant.

The defendant in his affidavit at encl. 5 (in opposing the plaintiff's application for summary judgment) denies agreeing to pay any legal fee to the plaintiff and avers that the professional services were rendered by the plaintiff to some other parties (which the defendant named) and not to the defendant and as such the claim should be made to those parties. The defendant further avers that the first time he saw the plaintiff's notes of professional charges was when he read the plaintiff's supporting affidavit (encl. 4) in the O. 14 application. In his affidavit at encl. 5 the defendant states:

> 10. Oleh yang demikian, saya menafikan berhutang kepada Plaintif untuk jumlah yang dituntut tersebut. Saya juga mengatakan bahawa semasa saya meneliti kandungan affidavit Plaintif, itulah kali pertama saya melihat nota-nota yuran professional Plaintif.

In their affidavit in reply at encl. 6, the plaintiff, however, avers that the notes of professional charges were given by hand to the defendant's secretary. The plaintiff alleges that the averment in para. 10 of the defendant's affidavit at encl. 5 is a lie. Plaintiff's affidavit containing these allegations reads as follows:

> 6. Berkenaan perenggan 10 Afidavit tersebut, saya menyatakan bahawa nota-nota professional tersebut telah diberi kepada setiausaha pihak Defendan iaitu Cik Teh Li Li secara serahan tangan. Oleh demikian, pengataan pihak Defendan adalah bohong.

In his affidavit in reply (at encl. 6A), the defendant maintains that he has never seen those notes of professional charges. His affidavit states:

> 6. Sebagai jawapan kepada perenggan 6 Afidavit Jawapan tersebut, saya mengulangi perenggan 10 Afidavit Jawapan Defendan dan mengatakan bahawa saya tidak pernah menerima nota-nota professional tersebut.

It is important to note that there is no affidavit by Miss Teh filed by either party.

Thereafter, by summons in chambers (encl. 7), the plaintiff made an application to cross-examine the said Miss Teh pursuant to O. 38 r. 2(3). The registrar dismissed the application. Hence, this appeal to judge in chambers.

In his argument before me at the hearing of this appeal, the learned counsel for the appellant/plaintiff relies on:

(1) *Leiserach v. Schalit* [1934] 2 KB 353;

(2) *William Horace Sault v. Noriah binte Osman* [1950] 16 MLJ 207; and

(3) *Gomez v. Gomez* [1969] 1 MLJ 228.

In my judgment, this application by the plaintiff to cross-examine the said Miss Teh is misconceived because by reason of the words:

> … the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit …

in O. 38 r. 2(3), I have the power to order the attendance of Miss Teh for cross-examination only if she had sworn an affidavit. But in the present case, as has been noted, Miss Teh had not deposed any affidavit. Therefore, I have no power to order her attendance for cross-examination. In fact, in the first place, since she had not deposed any affidavit, the question of cross-examination does not arise at all. A party to a proceeding cannot apply to cross-examine a person if in the first place such person has not given any evidence either in the form of oral evidence or in the form of affidavit evidence. For, in the absence of such prior evidence, there is no material on which to cross-examine.

The case of *Leiserach v. Schalit*, cited by the plaintiff's counsel, is not relevant for three reasons. First, the application in that case was not made pursuant to a rule of procedure that is in *pari materia* to our O. 38 r. 2(3) of the RHC, although in the submission the learned counsel for the applicant did refer to O. LII r. 4 of the English Supreme Court Rules. This is clear from the law report where the relevant part says:

> Croom-Johnson K.C. and B.B. Stenham (Frank Whitworth with them) for Schalit in support of the application: On a motion to set aside an award the Court has jurisdiction to allow the arbitrator to be called as a witness in regard to the matter which passed before him during the arbitration: see *In re Whiteley and Roberts Arbitration* [1891] 1 Ch. 558, and

Buccleuch (Duke) v. Metropolitan Board of Works [1872] LR 5 HL 418. On such an application Order LII r. 4 does not exclude evidence other than by affidavit.

Second, the application (by way of notice of motion) in the case cited was not to cross-examine the deponent of an affidavit, or to cross-examine anyone, but to call two arbitrators as witnesses in regard to disputed matters in an application to set aside an arbitration award.

Third, Humphrey J in his brief judgment did not base his decision on any rule and in fact did not even refer to any rule. The judgment was based purely on a legal principle: that although as a general rule the proceeding on a motion should be by way of affidavits, nevertheless, the court should allow an application to call witnesses to supplement affidavit evidence if in the light of the exceptional circumstances of the case the court considers it appropriate to do so in order to ascertain the true facts and to do justice to the parties. This is what the learned judge said (at p. 355):

> This is a case in which the Court has listened to numerous affidavits, statements in some of which directly contradict the statements in others. It is also a case which it is essential, in order to do justice, that the Court should be enabled to make up its mind as to the actual facts of the case. In the view of the Court this is an exceptional case, and in this exceptional case the Court has arrived at the conclusion that the only way in which it can satisfactorily deal with the matter before it, is by having the assistance of the evidence of the arbitrators, who, being independent persons, can tell the Court what it is unable to ascertain from a perusal of the affidavits on one side and the other – namely, what are the essential facts of the case. On that ground and on that ground only the Court accedes to the application to call as witnesses both the gentlemen who acted as arbitrators in the matter.

Likewise, William Horace Sault can also be distinguished. In this case cited, it was not an application by a party to cross-examine a witness or to cross-examine anyone but an application to call witnesses to prove that the repayment of a mortgage debt had been compelled by duress. The application was made orally by counsel for the respondent at the commencement of the hearing of the originating motion (the main action); however, learned counsel did not cite any particular rule on which his application was based. Pretheroe J, although was of the view that he had the power to call witnesses in an exceptional case, nevertheless, after having given due consideration to the facts and the merit of the application before him, rejected the application. The learned judge did not base his view on any particular rule of procedure but rather on the principle enunciated in *Leiserach v. Schalit.*

In *Gomez v. Gomez*, a woman (W) by way of divorce petition successfully obtained a divorce from her husband (H). W was granted custody of a child. Both W and H were Catholics. After the divorce, W remarried a man professing the Hindu faith. H, by summons in chambers, made an application to vary the order of custody of the child on the ground that W, by remarrying a Hindu, was no longer a fit and proper person to have custody of the child. H now wants custody of the child. In opposing the application, W, in her affidavit exhibited a letter written by an assistant priest, one Rev. Father Wood of St. Francis Xavier's Church, addressed to "To Whom It May Concern" stating that W was still capable of taking care of the child's religious and moral upbringing and that her remarriage placed no obstacle to W and her child practising their Catholic faith. Invoking O. 38 r. 1 of the Rules of the Supreme Court 1957 (which has been repealed and now replaced by the present RHC) H applied to cross-examine the said Rev. Father Wood. Like the present case, Rev. Father Wood did not depose any affidavit. Raja Azlan Shah J (as he then was) allowed the application, basing on O. 38 r. 1 of the Rules of the Supreme Court 1957 (hereinafter shall be referred to as "the RSC 1957") which, in effect, is similar to the present O. 38 r. 2(3) of the RHC. Order 38 r. 1 of the RSC 1957 provides that:

> … a judge may, on the application of either party, order the attendance for cross-examination of the person making any such affidavit.

In allowing the application, his lordship ruled that the Reverend could be cross-examined because as his letter had been exhibited by W's affidavit it is the same as if he had sworn an affidavit. In the words of the learned judge (at p. 230):

> In the present case there is only one issue, that is, the issue in the pending action which is whether the order of custody can be varied. The matter raised in the three affidavits are all matters relating to the action. The applicant complains that the respondent is no longer a fit and proper person to have custody of the child. The respondent says that she is still capable of looking after the child's religious and moral upbringing. The Rev. Father Wood supports her. It is the same as if he has sworn an affidavit to that effect. It is therefore only fair and proper that the appellant be allowed to cross-examine them on their affidavits.

In all humility and with the greatest respect, I am unable to share his lordship's view. In my opinion, since the said Rev. Father Wood had not sworn an affidavit, the court had no power under O. 38 r. 1 of the RSC 1957 to order him to the attend the proceeding for cross-examination. To my mind, the provision is clear on this point. Moreover, in the absence of

an affidavit by him, there is nothing for the opposing party to cross-examine. In my view, it is rather far fetched to say that by exhibiting the Reverend' letter in W's affidavit it is the same as if the said Reverend himself had sworn an affidavit. It is a fact that he had not sworn an affidavit and the mere exhibition of (allegedly) his letter by W's affidavit could not alter that fact.

In any case, the facts of the case before me can be distinguished from the facts of *Gomez v. Gomez*. Unlike in *Gomez v. Gomez*, where a letter allegedly written by the person whom the applicant sought to cross-examine was exhibited in the applicant's affidavit, none of the affidavits filed by the defendant in the present case exhibits any letter, note or memo written by Miss Teh. As has been pointed out above, despite the fact that several affidavits were filed by both sides, there was only a brief mention of Miss Teh and her role, and even that it was only in a single two-sentence paragraph – para. 6 of encl. 6.

Accordingly, this appeal is dismissed with costs.